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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 203.

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF WHEELING.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED OCTOBER 9, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of appeals of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of West Virginia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Wheeling, Parkersburgh and Cincinnati Transportation Company, plaintiff, and The City of Wheeling, defend-
2 ant, wherein was drawn in question the construction of certain clauses of the Constitution of the United States, and the decision was against the exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Wheeling, Parkersburgh and Cincinnati Transportation Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22d day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Issued September 22d, 1876.

[SEAL.]

JASPER Y. MOORE,
Clerk of the District Court of the United States for the District of West Virginia.

Allowed by—

A. F. HAYMOND,
President of the Supreme Court of Appeals of West Virginia.

Clerk's fee, $1.50, p'd by appellants.

(Indorsed:) United States. West Virginia supreme court of appeals. Wheeling, Parkersburg & Cincinnati Transportation Company vs. The City of Wheeling.

Filed in the clerk's office of the supreme court of appeals of West Virginia, accompanied by a copy for the defendant, this 23d day of September, A. D. 1876.

Attest:

O. S. LONG, *Clk.*

3 The United States of America to the city of Wheeling, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of West Virginia, wherein the Wheeling, Parkersburgh and Cincinnati Transportation Company is

plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable A. F. Haymond, president of the supreme court of appeals of the State of West Virginia, this 25th day of September, in the year of our Lord one thousand eight hundred and seventy-six.

A. F. HAYMOND,
President of the Supreme Court of Appeals of the State of West Virginia.

4 On this second day of October, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared Henry M. Russell before me, the subscriber, Hannibal Forbes, a commissioner of the district court of the United States for the district of West Virginia, and makes oath that he delivered a true copy of the within citation to Andrew J. Sweeney, the mayor of the city of Wheeling, who was at the time in said city, on the 30th day of September, A. D. 1876.

HENRY M. RUSSELL.

Sworn to and subscribed the 2nd day of October, A. D. 18 .
[SEAL.] HANNIBAL FORBES,
U. S. Com'r.

5 Know all men by these presents that we, C. H. Booth, George K. Wheat, and Henry Schmulbach, and John A. Armstrong are held and firmly bound unto the city of Wheeling in the full and just sum of one thousand dollars, to be paid to the said city of Wheeling, its certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately at a supreme court of appeals of West Virginia, in a suit depending in said court between the Wheeling, Parkersburg and Cincinnati Transportation Company and The City of Wheeling, judgment was rendered against the said Wheeling, Parkersburg and Cincinnati Transportation Company, and the said Wheeling, Parkersburg and Cincinnati Transportation Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said city of Wheeling citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Wheeling, Parkersburg and Cincinnati Transportation Company shall prosecute its writ of error to effect, and answer all damages and costs if

it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

C. H. BOOTH. [L. S.]
GEO. K. WHEAT. [L. S.]
HENRY SCHMULBACH. [L. S.]
JOHN A. ARMSTRONG. [SEAL.]

Sealed and delivered in presence of—
O. S. LONG.

Approved by me.

A. F. HAYMOND,
President of the Supreme Court of Appeals of State of West Virginia.

A copy.
Teste:

O. S. LONG,
Clk S. C't of Appeals of W. Va.

(Indorsed:) W., P. & C. Trans. Co. vs. City of Wheeling. Copy of bond. Original filed in clerk's office of the supreme court of appeals of W. Va. Oct. 2, 1876. O. S. Long, clerk.

6 WEST VIRGINIA:

Pleas before the supreme court of appeals of West Virginia in the city of Wheeling on the 17th day of July, 1876.

Be it remembered that heretofore came the Wheeling, Parkersburg and Cincinnati Transportation Company, by Henry M. Russell, esquire, its attorney, and presented to one of the judges of our supreme court of appeals of West Virginia, in vacation, a petition for a writ of supersedeas to a judgment of the municipal court of Wheeling rendered on the 17th day of November, 1875, in a cause in which the said Wheeling, Parkersburg and Cincinnati Transportation Company was plaintiff and the city of Wheeling was defendant, which said petition, the endorsement thereon by a judge of the said supreme court of appeals, and the record of the said municipal court of Wheeling accompanying the same, are in the words and figures following, to wit:

7 *Petition.*

Supreme court of appeals of West Virginia, Wheeling.

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION CO.
vs.
THE CITY OF WHEELING.

To the honorable judges of the supreme court of appeals of West Virginia:

Your petitioner, The Wheeling, Parkersburg and Cincinnati Transportation Company, humbly represents that on the 13th day of July, A. D. 1875, a suit was instituted in the municipal court of Wheeling, on the common law side thereof, by your petitioner, against the city of Wheeling, wherein such proceedings were had that a judgment was rendered against your petitioner by the said court on the 17th day of November, A. D. 1875. A transcript of the record of the proceedings in which suit, and of the said judgment therein, is herewith exhibited.

8 Your petitioner is advised, and so represents to your honors,

that the said judgment is erroneous, and your petitioner is aggrieved thereby in the following particulars, to wit:

1st. In that the demurrers to the first and second counts of your petitioner's declaration were sustained by the said municipal court.

2d. In that the said municipal court found for the said defendant on the issue of fact joined upon the defendant's plea.

3d. In that the said municipal court refused to set aside its said finding for the defendant upon the said issue of fact, and to find for your petitioner.

4th. In that the said municipal court gave judgment for the defendant upon its said finding.

And your petitioner further represents that the said judgment is in other respects uncertain, informal, and erroneous.

Your petitioner therefore prays that an appeal and a writ of supersedeas may be awarded it, in order that the said judgment may, for the causes of error aforesaid, before your court be caused to come, that the whole matter in the said cause contained may be reheard, and that the said judgment may be reversed and annulled. And your petitioner will ever pray, &c.

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY.

By HENRY M. RUSSELL,
Its Attorney.

I, Henry M. Russell, an attorney at law practicing in the supreme court of appeals of West Virginia, do hereby certify that in my opinion it is proper that the decision of the municipal court of Wheeling, in the case of The Wheeling, Parkersburg and Cincinnati Transportation Company vs. The City of Wheeling, the record of which accompanies the foregoing petition, should be reviewed by the appellate court.

Given under my hand this 29th day of December, A. D. 1875.

HENRY M. RUSSELL.

STATE OF WEST VIRGINIA, *to wit:*

On examination and consideration of the foregoing petition and assignment of errors therein, and the official copy of the record filed
9 therewith, a supersedeas is granted and allowed the petitioner to the judgment of the municipal court of Wheeling, rendered in the cause in said petition mentioned on the 17th day of November, 1875, against the petitioner, to take effect on the petitioner or some other person executing bond, with good personal security, before the clerk of said municipal court, according to law, in the penalty of $300.00, conditioned according to law.

Given under my hand this first day of December, 1875.

A. F. HAYMOND,
Judge of the Supreme Court of Appeals.

To O. S. LONG, *Clerk of the Supreme Court of Appeals.*

10 RECORD.

Pleas before the judge of the municipal court of Wheeling, West Virginia, Ohio County, sitting pursuant to an order made on the day day of , 1875, at the council chamber in said city, on the 17th day of November, 1875, and in the 12th year of the State.

Be it remembered that heretofore, to wit, on the 3d day of July, 1875,

came the Wheeling, Parkersburg and Cincinnati Transportation Company, by its attorney, and sued out a summons in law against the City of Wheeling, which summons, with the return thereon, is in the words and figures following, to wit:

Summons.

The State of West Virginia to the sergeant of the city of Wheeling, greeting:

We command you that you summon the City of Wheeling, if it be found in your bailiwick, to appear at the clerk's office of the municipal court of Wheeling, at rules to be held for the said court on the second Monday in August, 1875, to answer the Wheeling, Parkersburg and Cincinnati Transportation Company, of a plea of trespass on the case in assumpsit; damage, $1,000; and have then there this writ.

Witness Thomas M. Darrah, clerk of our said court, in the city of Wheeling, the 13th day of July, 1875.

THOMAS M. DARRAH, *Clerk.*

Sergeant's return.

Served the within writ the 13th day of July, 1875, by delivering a copy thereof to A. J. Sweeney, mayor of the city of Wheeling.

JOHN P. ST. MYERS, *D. S.*,
For E. M. DAVIS, *C. S.*

11 And at another day, to wit, at rules held in the clerk's office aforesaid for the month of August, 1875, came the said Wheeling, Parkersburg and Cincinnati Transportation Company, by its counsel, and filed its declaration in assumpsit, which is in the words and figures following, to wit:

Declaration.

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY *vs.* THE CITY OF WHEELING. } In assumpsit.

The Wheeling, Parkersburg and Cincinnati Transportation Company, a corporation organized under the laws of the State of West Virginia, complains of The City of Wheeling, a corporation organized and chartered as a city under the laws of the said State, of a plea of trespass on the case in assumpsit; and the said plaintiff says that it was created and organized as an incorporated company in the year 1868, for the purpose of carrying on a transportation business with steamboats and barges upon the Western rivers; that during the year 1874 the said plaintiff owned four steamboats, each of them of more than twenty tons burden, named respectively, Courier, Express No. 2, Mollie Ragan, and Science, with their respective and appropriate furniture; that during the said last mentioned year the said plaintiff owned no other property whatever; that during the whole of the said last mentioned year the said plaintiff used and emp'oyed its said four vessels and their said furniture in making daily voyages for the purposes of commerce, and in carrying passengers and freight for hire between various ports on the Ohio River, which is tributary to the Mississippi River, and navigable

throughout its entire extent for vessels of more than twenty tons burden; that several of the said ports, to wit, the city of Bellaire and others, are in the State of Ohio, and several others of them, to wit, the city of Wheeling and others, are in the State of West Virginia; that the said plaintiff did not during the said last mentioned year employ the said vessels, or any of them, or any of their said furniture, in any other manner than as hereinbefore set forth; that the said four vessels were during the said last-mentioned years duly enrolled and licensed under the laws of the United States in such cases made and provided; and
12 that the said plaintiff paid all fees and dues of every kind chargeable on the said vessels under the laws of the United States; that the said enrollments of the said four vessels were made, and the said licenses were issued to them in the district of Wheeling, on the day and year in the said licenses mentioned, to wit, on the first day of January in the said last-mentioned year; that none of the said four vessels, nor any of the said furniture, was at any time during the said last-mentioned year within the jurisdiction of the said city of Wheeling for the purposes of taxation; that the said defendant heretofore, to wit, on the first day of January, in the year 1875, at the said city of Wheeling, demanded from the said plaintiff a certain large sum of money, to wit, the sum of $1,000, in payment for the use of its wharves by the said four boats of the said plaintiff for and during the said year 1874, which sum the said plaintiff then and there paid to the said defendant.

And the said plaintiff says that the said defendant, well knowing all of the said premises, and in spite of the provisions of the Constitution of the United States and of the laws of Congress in such case made and provided, heretofore, to wit, in the year 1874, on some day thereof to the plaintiff unknown, at the said city of Wheeling, caused the said vessels and their said furniture to be assessed along with the personal property within the said city of Wheeling, and to be entered upon the books of its assessor as liable to be taxed for the said last mentioned year by the said city of Wheeling, for the purpose of raising a revenue for the general and ordinary expenses of the said city of Wheeling, which assessment the said plaintiff says was wholly illegal and void. And the said defendant afterwards, to wit, on the tenth day of July, in the year 1875, at the said city of Wheeling, in pursuance of the said illegal assessment, caused a tax bill to be drawn up against the said plaintiff for a certain large sum of money therein mentioned, to wit, the sum of sixty dollars, for taxes upon said vessels for the said year 1874, which taxes were intended for the general and ordinary expenses of the said city of Wheeling, and then and there, to wit, on the said tenth day of July, in the year 1875, at the said city of Wheeling, demanded the said sum of sixty dollars for the said taxes of and from the plaintiff, which demand the said plaintiff says was wholly illegal; and the said defendant then and there, to wit, on the day and year last afore-
13 said, at the said city of Wheeling, threatened the said plaintiff that, for the purpose of collecting the said sum of sixty dollars for the said taxes, it, the said defendant, would then and there levy upon and sell the said boats and their said furniture, or such and so much thereof as would be sufficient when sold to produce the said sum of sixty dollars; and the said plaintiff then and there, to wit, on the day and year last aforesaid, at the said city of Wheeling, involuntarily, and because of the said demand upon it by the said defendant, and to avoid the said threatened levy, paid to the said defendant the said sum of sixty dollars for the said taxes; and the said plaintiff says that at the said time and place at which it paid the said sum of sixty dollars to th-

said defendant as aforesaid, it objected to pay the same, and informed the said defendant of its said objection, and protested against the said assessment and the said demand for the said taxes as illegal; of all of which several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the said city of Wheeling, had notice, by means whereof the said defendant became liable to pay to the said plaintiff the said sum of sixty dollars, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the said city of Wheeling, undertook and promised to pay the said plaintiff the said sum of sixty dollars when it should be thereunto afterwards requested, yet the said defendant, although often requested, has not as yet paid the said sum of sixty dollars, or any part thereof, to the said plaintiff, but the same to pay has hitherto wholly refused, and still does refuse, to the damage of the said plaintiff $1,000.

SECOND COUNT.

And the said Wheeling, Parkersburg and Cincinnati Transportation Company complains of the said City of Wheeling of a further plea of trespass on the case in assumpsit, and says that it was created and organized as an incorporated company in the year 1868, for the purpose of carrying on a transportation business with steamboats and barges upon the Western rivers; that during the years 1870, 1871, 1872, 1873, and 1874, the said plaintiff owned, at various times during the said years, at no time during the said years being without some of them, and at no time owning all of them together, eight steamboats, each of them
14 of more than twenty tons burden, named respectively Express, Eagle, New State, Rebecca, Courier, Express No. 2, Mollie Ragan, and Science, with their respective and appropriate furniture of every kind, of which said vessels the four last named are not owned by the said plaintiff; that during the said years the said plaintiff owned no other property of any kind whatsoever; that during the whole of all of the said years the said plaintiff used and employed all of its said vessels with their said furniture, during such periods as it owned them respectively, in making daily voyages for purposes of commerce, and in carrying passengers and freight for hire between various points on the Ohio River, which is a tributary of the Mississippi River, and navigable throughout its entire extent for vessels of more than twenty tons burden; that several of the said ports, to wit, the city of Bellaire and others, are in the State of Ohio, and several others of them, to wit, the city of Wheeling and others, are in the State of West Virginia; that the said plaintiff has never employed any of its said vessels in any other manner than as hereinbefore set forth; that during all such times the said plaintiff owned each of the said vessels, it was duly enrolled and licensed under the laws of the United States in such case made and provided, and that the said plaintiff paid all fees and dues of every kind chargeable on each of the said vessels under the laws of the United States; that the said respective enrollments were made and the said licenses issued to the said vessels respectively, and during the said successive years at the port of Wheeling; and the said plaintiff says that none of the said vessels was at any time during the said years, and while it was owned by the said plaintiff, within the jurisdiction of the said city of Wheeling for the purposes of taxation; and the said plaintiff says that the said defendant heretofore, to wit, on the first day of January, in the year 1871, at the said city of Wheeling, demanded from the said plaintiff a certain large sum of money, to wit, the sum of one thousand

dollars, in payment for its use of its wharves by the said boats of the said plaintiff for and during the said year 1870, which said sum the said plaintiff then and there paid to the said defendant; and afterwards a like sum for the same purpose was demanded by and paid to the said defendant yearly for the use of its said wharves by the said boats for and during the said years 1871, 1872, 1873, and 1874.

15 And the said plaintiff says that the said defendant, well knowing all the said premises, and in spite of the provisions of the Constitution of the United States, and of the laws of Congress in such case made and provided, heretofore, to wit, in the year 1870, on some day thereo to the said plaintiff unknown, at the said city of Wheeling, caused such of the boats, with their said furniture, as the said plaintiff then owned to be assessed along with the personal property within the said city of Wheeling, and to be entered upon the books of its assessor as liable to be taxed for the said last-mentioned year by the said city of Wheeling for the purpose of raising a revenue for the general and ordinary expenses of the said city; and the said defendant afterwards, to wit, in the year 1871, on some day thereof to the said plaintiff unknown, at the said city of Wheeling, caused such of the said boats, with their said furniture, as the said plaintiff then owned to be assessed along with the personal property within the said city of Wheeling, and to be entered upon the books of its assessor as liable to be taxed for the said last-mentioned year by the said city of Wheeling for the purpose of raising a revenue for the general and ordinary expenses of the said city; and the said defendant afterwards, to wit, in the year 1872, on some day thereof to the said plaintiff unknown, caused such of the said boats, with their said furniture, as the said plaintiff then owned to be assessed along with the personal property within the said city of Wheeling, and to be entered upon the books of its assessors as liable to be taxed for the said last-mentioned year by the said city of Wheeling for the purpose of raising a revenue for the general and ordinary expenses of the said city; and the said defendant afterwards, to wit, in the year 1873, on some day thereof to the said plaintiff unknown, caused such of the said boats, with their furniture, as the said plaintiff then owned to be assessed along with the personal property within the said city of Wheeling, and entered upon the books of its assessor as liable to be taxed for the said last-mentioned year by the said city of Wheeling for the purpose of raising a revenue for the general and ordinary expenses of the said city; and the said defendant afterwards, to wit, in the year 1874, on some day thereof to the said plaintiff unknown, caused such of the said boats, with their furniture, as the said plaintiff then owned to be as-

16 sessed along with the personal property within the said city of Wheeling, and entered upon the books of its assessor as liable to be taxed for the said last-mentioned year by the said city of Wheeling for the purpose of raising a revenue for the general and ordinary expenses of the said city.

And the said plaintiff says that each and all of the said assessments were illegal and void; and the said defendant afterwards, to wit, on the tenth day of July, in the year 1875, at the said city of Wheeling, caused several tax bills to be drawn up against the said plaintiff in pursuance of the said several illegal assessments, which said tax bills were respectively for the said years 1870, 1871, 1872, 1873, and 1874, and each of which was for a certain large sum of money, to wit, that for the year 1870 for the sum of $120; that for the year 1871 for the sum of $125; that for the year 1872 for the sum of $125; that for the year 1873 for the sum of $90; and that for the year 1874 for the sum of $60—making in the ag-

gregate the sum of $520 for taxes, for the purpose of raising a revenue for the general and ordinary expenses of the said city of Wheeling; and the said defendant then and there, to wit, on the said tenth day of July, in the year 1875, at the city of Wheeling, demanded of and from the said plaintiff the sum of $520 as taxes as aforesaid for the said purpose upon the said vessels and their furniture; and the said plaintiff says that the said demand for the said sum of $520, or for any part thereof, was wholly illegal; and the said plaintiff says that the said defendant then and there, to wit, on the day and year last aforesaid, at the said city of Wheeling, threatened the said plaintiff that for the purpose of collecting the said sum of $520 for the said taxes, it, the said defendant, would then and there levy upon and sell such, or such portion of the said boats as the said plaintiff then had, as would be sufficient when sold to produce the sum of $520. And the said plaintiff says that then and there, to wit, on the day and year last aforesaid, at the said city of Wheeling, because of the said demand upon it by the said defendant, and to avoid the said threatened levy, the said plaintiff paid to the said defendant the said sum of $520 for the said taxes; and the said plaintiff says, at the time and place at which it paid the said sum of $520 to the said defendant as aforesaid, it objected to paying the same, and informed the said defendant of its objections, and protested against the said several assessments, and the said demand for the said sum for the said taxes, or for any other sum, as illegal; of all of which said several premises the said defendant afterward, to wit, on the day and year last aforesaid, at the said city of Wheeling, had notice, by means whereof the said defendant became liable to pay to the said plaintiff the said sum of $520, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the said city of Wheeling, undertook and then and there faithfully promised the said plaintiff to pay it the said sum of $520 when it should be thereunto afterwards requested; yet the said defendant has not as yet paid the said sum of $520 to the said plaintiff, or any part thereof, although often requested so to do, but to pay the same to the said plaintiff hath hitherto wholly refused and still doth refuse, to the damage of the said plaintiff $1,000.

17

And the said Wheeling, Parkersburg and Cincinnati Transportation Company complain of the said city of Wheeling of a further plea of trespass on the case in assumpsit, for that whereas the said defendant heretofore, to wit, on the 12th day of July, in the year 1875, at said city of Wheeling, was indebted to the said plaintiff in the sum of $1,000 for the work, labor, care, and diligence of said plaintiff before that time done, performed, and bestowed in and about the business of said defendant and for the said defendant and at its special instance and request, and also for divers material and other necessary things by said plaintiff before that time found and provided and used and applied for said defendant in and about that work and labor, and at said defendant's like special instance and request; and also in the further sum of $1,000 for divers goods, wares, merchandise, and chattels by the said plaintiff before that time sold and delivered to the said defendant and at said defendant's like special instance and request; and also in the further sum of $1,000 for money by the said plaintiff before that time lent and advanced to, and paid, laid out and expended for the said defendant and at said defendant's like special instance and request; and also in the further sum of $1,000 for other money by said defendant before that time had and received to and for the use of said plaintiff, and being so indebted, the said defendant, in consideration thereof, afterwards, to wit,

on the day and year last aforesaid, at said city of Wheeling, undertook and then and there faithfully promised said plaintiff to pay it the
18 several sums of money in this count mentioned when said defendant should be thereto afterwards requested.

And whereas, also, the said defendant heretofore, to wit, on the day and year last aforesaid, at said city of Wheeling, accounted with said plaintiff of and concerning divers other sums of money from said defendant to said plaintiff before that time due and owing and then in arrear and unpaid, and upon said accounting the said defendant was then and there found to be in arrear and indebted to said plaintiff in the further sum of $1,000, and being so found in arrear and indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at said county, undertook and then and there faithfully promised said plaintiff to pay it the last-mentioned sum of money when said defendant should be thereto afterwards requested. Nevertheless, the said defendant, not regarding its said several promises and undertakings, has not as yet paid the several sums of money, or any or either of them, or any part thereof, to said plaintiff, although often requested so to do, but to pay the same to said plaintiff said defendant has hitherto wholly neglected and refused and still does neglect and refuse, to the damage of said plaintiff of $1,000. And, therefore, said plaintiff brings its suit, &c.

HENRY M. RUSSELL,
Attorney for Plaintiff.

The following bill of particulars was filed with the said declaration:

The City of Wheeling to the Wheeling, Parkersburg and Cincinnati Transportation Company, D'r.

July 12th.—Taxes illegally collected for				1870.....	$120 00
"	"	"	"	1871.....	125 00
"	"	"	"	1872.....	125 00
"	"	"	"	1873.....	90 00
"	"	"	"	1874.....	60 00
					$520 00

19 *Judgment.*

And at another day, at a session of the municipal court held in the said council chamber in said city, on the 17th day of November, 1875, and in the twelfth year of the State:

WHEELING, PARKERSBURG AND CINCINNATI Transportation Company *vs.* THE CITY OF WHEELING. } In assumpsit.

This day came the parties, by their attorneys, and on motion of the defendant, the judgment rendered against it in the office is set aside, and the defendant demurs to the declaration of the plaintiff, and to each count thereof. Upon consideration whereof, the court sustains the demurrers to the first and to the second count of the said declaration, and overrules the demurrers to the remaining counts thereof. Thereupon the said defendant for plea, says that it did not assume upon itself and promise in manner and form as the said plaintiff in its declaration

hath alleged, and of this it puts itself upon the country and the plaintiff doth the like; and a jury having been waived by consent, and the court having heard in lieu of a jury the evidence contained in the agreed statement of facts filed in the case, which was all the evidence offered, and having heard the arguments of counsel, it is considered by the court that the plaintiff take nothing by his bill, and that the defendant go thereof without day and recover against the plaintiff its costs by it in this behalf expended. And to this action of the court in rendering judgment for the defendant, the plaintiff excepts and tenders its bill of exceptions, which is, at its request, signed, sealed, and made a part of the record.

Bill of exceptions.

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY
vs.
THE CITY OF WHEELING. } In assumpsit.

Be it remembered that upon the trial of this cause, upon the issue joined on the defendant's plea, the parties, by their respective attorneys, agreed in open court that the following might be considered and taken as a statement of the facts and the only facts proved, to wit:

20 IN THE MUNICIPAL COURT OF WHEELING, *ss:*

THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY
vs.
THE CITY OF WHEELING. } In assumpsit.

It is agreed between the plaintiff and the defendant to this suit that upon the issues of fact joined in the cause, the following shall be regarded as a statement of the facts proved, to wit:

The city of Wheeling is, and was before the year 1868, a corporation chartered as a city under the laws of Virginia and West Virginia. The Wheeling, Parkersburg and Cincinnati Transportation Company is a corporation chartered and organized in the year 1868, under the laws of the State of West Virginia, for the purpose of carrying on a transportation business with steamboats and barges upon the Western rivers. A portion of its stockholders reside in West Virginia and part in Ohio; the officers of said company reside in Wheeling; its principal office is there. During the year 1870, 1871, 1872, 1873, and 1874, the plaintiff owned eight steamboats, having a different number of them at different times during the said years, and owning usually two (2), three, or four at the same time. At the time of the institution of this suit, the plaintiff owned four of the said steamboats; each of said steamboats is of greater burden than twenty tons; during the said five years the plaintiff owned no other property whatever except the said steamboats and their appropriate outfits; during all of the said years the plaintiff employed all of the said vessels, during such periods as it owned them respectively, in making daily voyages between the city of Wheeling and the city of Parkersburg, in Wood County, West Virginia, a distance of about one hundred miles down the Ohio River. Each vessel began its voyage at Wheeling every alternate day about 10.30 a. m., touched, in order to

discharge and receive passengers and freight, at various towns along the river, some of which are in the State of Ohio and some in the State of West Virginia; arrived at Parkersburg about midnight; remained there at the wharf until about daylight, when it left on its return voyage; stopped at the same places and for the same purposes on its way up the river, and reached Wheeling between midnight and morning, according to the stage of water in the river, remaining at the Wheeling
21 wharf from that time until its hour of departure. These voyages were made for the purpose of transporting for hire passengers and freight between the said various ports, and much of the plaintiff's business consisted in transporting passengers and freight from one port in Ohio to another in the same State, some in transporting them from one port in West Virginia to another in Ohio, and some in transporting them from one port in West Virginia to another in the same State; these vessels have been used in no other manner than as herein set forth. There were always at least three of said boats either at the wharves of said city or lying along some portion of the bank of said river within the corporate limits of said city. Each of the said vessels during such time as it was owned by the plaintiff, was duly enrolled and licensed as a coasting vessel under the laws of the United States, and the plaintiff paid for it all dues, fees, and charges which were demandable under the laws of the United States. The plaintiff has paid the defendant various sums of money for the use of its wharves by the said vessels, and all that was demanded on that account, and no part of the taxes hereinafter mentioned was demanded as wharfage dues. That portion of the laws of the State of West Virginia under which the taxes hereinafter mentioned were assessed, levied, and collected, is as follows:

"The council of the city of Wheeling shall have authority, under such regulations as they may prescribe by ordinance, to assess, levy, and collect an annual tax for the use of the city on personal property in the city, not to exceed in any year fifty cents on every hundred dollars of the assessed valuation thereof; and the words personal property shall be deemed to include all subjects of taxation which the assessors acting under the laws of the State are or shall be by law required to enter on their personal property books for the purpose of State taxation."

Another portion of the said laws gives the right to the person appointed to collect such tax, in case it shall not be paid, to take reasonable distress of any personal property in the city belonging to the delinquent, to sell the same, and pay the tax out of the proceeds.

George Q. Black, the collector hereinafter named, was, during the years 1874 and 1875, the person duly appointed by the city to collect its taxes, as was Jacob M. Warden (the taxes collectable by whom the
22 said George Q. Black was at the time when he collected them duly authorized to collect), during the years 1870, 1871, 1872, and 1873; during each of the years 1870, 1871, 1872, 1873, and 1874, the plaintiff was by the regular officers of said city assessed with personal property in various amounts; there is no objection to the amount of these assessments; the tax-bills hereinafter set out are copies of the assessor's book, so far as they relate to the plaintiff, except those parts of the tax-bills which are receipts. On the 10th day of July, 1875, the said George Q. Black, as collector as aforesaid, demanded of the plaintiff taxes for the said years 1870, 1871, 1872, 1873, and 1874, in the amounts and according to the assessments contained in said tax-bills, and threatened to levy on one of the plaintiff's boats unless the said taxes were paid; the plaintiff then, under protest and in order to escape said levy, and explaining to the said collector that it believed the taxes

illegal, and paid them with the intention of suing for their recovery, paid the said taxes to said Black for said city; the dates and amounts are correctly set forth in the said tax-bills; the tax-bills were then signed and delivered as receipts to the plaintiff by said Black. The following are copies of them, to wit:

Tax bill for 1870.

Wheeling, Parkersburg and Cincinnati Transportation Co., to the city of Wheeling, D'r.

1870.	$ cts.	$ cts.
Tax on titheable		
Tax on dog slut		
Tax valuation, $ on town lot No.....		
On total valuation, $24,000, at 50 cents on every $100 val. p. p.....		120 00
Interest on $ for days, at 10 per cent. per annum.....		

Received the above.

GEORGE Q. BLACK, *D. C.*,
For JACOB M. WARDEN, *City Col.*

JULY 10TH, 1875.

23

Tax bill for 1871.

Wheeling, Parkersburg and Cincinn'ti Transportation Co., to the city of Wheeling, D'r.

	$ cts.	$ cts.
Tax on titheable		
dog slut		
Tax valuation, $ on town lot, No		
Total valuation, $, at 50 cents on every $100 valuation real estate....		
On total valuation real estate, at 20 cents on every $100 for r. r. purposes.		
On total valuation, $25,000, at 50 cents on every $100 valuation p. p		125 00
School levy, city dist., 30 cents, and for building fund 7 cents on every $100 valuation r. and p. p.....		92 50
		$217 50
Interest on $ for days, at 10 per cent. per annum.....		

Received the above.

GEO. Q. BLACK, *D. C.*,
For JACOB M. WARDEN, *City Col.*

JULY 10TH, 1875.

Tax bill for 1872.

Wheeling, Parkersbueg and Cincinnati Transportation Co., to the city of Wheeling, D'r.

	$ cts.	$ cts.
Tax on titheable		
Tax on dog slut		
Tax valuation, $ on town lot No.....		
Total valuation, $, at 50 cents on every $100 valuation real estate.		
24 On total valuation, real estate, at 10 cents on every $100, for r. r. purposes.....		
On total valuation, $25,000, at 50 cents on every $100 valuation p. p.		125 00
School levy, city district, 25 cents, and for building fund 20 cents on every $100 valuation r. and p. p.		112 50
		$237 50
Interest on $ for days, at 10 per cent. per annum.....		

Received the above.

GEO. Q. BLACK, *D. C.*,
For JACOB M. WARDEN, *City Col.*

JULY 10TH, 1875.

Tax bill for 1873.

Wheeling, Parkersburg and Cincinnati Transportation Co., to the city of Wheeling, D'r.

	$ cts.	$ cts.
Tax on titheable		
Tax on dog slut		
Tax valuation, $ on town lot No		
Total valuation, $ at 30 cents on every $100 val. r. est		
On total valuation, $30,000, at 30 cents on every $100 val. p. p		90 00
School levy, city dist., 20 cents, and for building fund 15 cents on every $100 val. r. and p. p		105 00
		$195 00

Interest on $ for days, at 10 per cent. per annum

Received the above.

GEO. Q. BLACK, *D. C.*,
For JACOB M. WARDEN, *City Col.*

JULY 10TH, 1875.

25 Tax bill for 1874.

Wheeling, Parkersburg and Cincinnati Transportation Co., to the city of Wheeling.

	$ cts.	$ cts.
Tax on titheable		
Tax on dog slut		
Total valuation, $ on town lot No		
Total valuation, real estate, $, at 30 cents on every $100 valuation		
Total valuation personal property, $20,000, at 30 cents on every $100 valuation		60 00
School levy, city dist., 25 cents, and for building fund 15 cents on every $100 val. r. est. and p. prop		80 00
		$140 00

Interest on $ for days, at 10 per cent. per annum

Received the above.

GEO. Q. BLACK, *D. C.*,
For GEO. Q. BLACK, *City Col.*

JULY 10TH, 1875.

The abbreviations "p. p." in the said tax bill mean "personal property." The amounts collected and named as "school levy" were not for the city. The said taxes paid the said Black for the said city were for the general expenses and purposes of the city, and not for any special fund. The plaintiff before bringing this suit demanded from the said city, the defendant, the taxes so paid. In making the said assessment upon the plaintiff its property was assessed according to value, and not according to any other rule of calculation, estimating its value in proportion to the assessments upon personal property generally in the said city.

26 Signed for plaintiff and for defendant this 14th day of September, 1875.

HENRY M. RUSSELL,
For Plaintiff.
G. W. JEFFERS,
Attorney for Defendant.

And the court having, in lieu of a jury, found for the defendant upon the said issue, the plaintiff moved the court to set aside its said finding and find for the plaintiff, and the court overruled the plaintiff's said motion, and gave judgment for the defendant. To which action of the court the plaintiff excepted, and tendered this its bill of exceptions, and asks that it may be signed, sealed, and made a part of the record; which is accordingly done.

[SEAL.]

G. L. CRANMER,
Judge of the Municipal Court of Wheeling.

STATE OF WEST VIRGINIA,
County of Ohio, City of Wheeling, to wit:

I, Thomas M. Darrah, clerk of the municipal court of Wheeling, do hereby certify that the foregoing is a true transcript of the record and proceedings in a case at law lately pending in said court, wherein the Wheeling, Parkersburg and Cincinnati Transportation Company is plaintiff, and the City of Wheeling is defendant, as fully and wholly as they now exist among the records of my office.

In testimony whereof I hereto set my hand and annex the seal of the said court this 22d day of November, 1875.

[MUNICIPAL SEAL.] THOMAS M. DARRAH, *Clerk.*

STATE OF WEST VIRGINIA,
County of Ohio, City of Wheeling, to wit:

I, Gibson L. Cranmer, only judge of the municipal court of Wheeling, in said county and State, do certify that Thomas M. Darrah, who hath given the preceding certificate, is clerk of the said court,
27 and was such at the date of the said certificate; that the above is his genuine signature, and that his said attestation is in due form.

Given under my hand this 22d day of November, A. D. 1875.

GIBSON L. CRANMER,
Judge of the Municipal Court of Wheeling.

STATE OF WEST VIRGINIA,
County of Ohio, City of Wheeling, to wit:

I, Thomas M. Darrah, clerk of the municipal court of Wheeling, do dereby certify that Gibson L. Cranmer, who signed the foregoing certificate, was, at the time of doing, and is now, the only judge within and for said court, duly commissioned and sworn as such, and that the above is his genuine signature.

Given under my hand this 22d day of November, A. D. 1875.

THOMAS M. DARRAH, *Clerk.*

Transcript, $11.00.

28 *Writ of supersedeas.*

The writ of supersedeas sued out of the supreme court of appeals in this cause is in the words and figures following, to wit:

The State of West Virginia to the sergeant of the city of Wheeling, greeting:

We command you that from all further proceedings on a judgment rendered by the municipal court of Wheeling on the 17th day of November, 1875, in a cause in which the Wheeling, Parkersburg and Cin-

cinnati Transportation Company was plaintiff, and the City of Wheeling was defendant, you altogether supersede; which judgment before the judges of our supreme court of appeals at Wheeling for cause of error in the same to be corrected, on the petition of the said Wheeling, Parkersburg and Cincinnati Transportation Company, we have caused to come. We also command you that you give notice to the said city of Wheeling, that it be before the judges of our said supreme
29 court of appeals, at Wheeling aforesaid, on the first Monday in January next, then and there to have a rehearing of the whole matter in the judgment aforesaid contained, and have then there this writ.

Witness, O. S. Long, clerk of our said supreme court of appeals, the 1st day of December, 1875, and in the 13th year of the State.

O. S. LONG.

MEMO.—The effect of this writ is to be suspended until the petitioner shall execute before the clerk of the municipal court of Wheeling bond with sufficient security, in the penalty of three hundred dollars, conditioned as the law directs; and until certificate of the due execution of such bond is endorsed on this writ by the clerk of said municpal court.

Teste:

O. S. LONG, *Clerk.*

Clerk's certificate.

Bond in the penalty of three hundred dollars, conditioned as the law directs, was executed before me on behalf of the petitioner in the
30 within cause on the 7th day of December, 1875, with C. H. Booth, of Wheeling, Ohio County, and State of West Virginia, as surety.

Teste:

THOMAS M. DARRAH,
Clerk of Municipal Court of Wheeling, Ohio County, W. Va.

Sergeant's return.

Served the within writ within the county of Ohio, this 8th day of December, 1875, by delivering a copy thereof to A. J. Sweeney, mayor of the city of Wheeling, he being a resident of said county.

JOHN P. ST MYERS, *D. S.*,
For E. M. DAVIS, *C. S.*

Sergeant's, fee, 75 cts.
Filed Dec. 10, 1875.
Teste: O. S. LONG, *Clerk.*

Bond.

The bond above referred to is in the words and figures following, to wit:

Know all men by these presents that we, The Wheeling, Parkersburg and Cincinnati Transportation Company, principal, and C. H. Booth, security, are held and firmly bound to the State of West
31 Virginia in the sum of three hundred dollars, to the payment of which to the said State we bind ourselves, jointly and severally, and each of us binds his heirs, executors, and administrators. Witness

our hands and seals, and the seal of the said company and the signatures of its president and secretary, this 7th day of December, 1875.

The condition of the above obligation is such that whereas to a judgment of the municipal court of Wheeling, Ohio County, in said State, rendered and entered on the 17th day of November, 1875, in a suit at law therein pending, wherein The Wheeling, Parkersburg and Cincinnati Transportation Company is plaintiff, and The City of Wheeling is defendant, one of the judges of the supreme court of appeals of the State of West Virginia, upon the petition of the plaintiff, has awarded supersedeas, fixing the penalty of the bond at three hundred dollars:

Now, therefore, if the said Wheeling, Parkersburg and Cincinnati
32 Transportation Company, plaintiff, shall perform and satisfy the said judgment in the case, the same shall be affirmed, or said supersedeas be dismissed, and shall pay all damages, costs, and fees which may be awarded against or incurred by the said petitioner, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

[SEAL.] WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY.

C. H. BOOTH, *Pres.* [SEAL.]
CHA'S MUHLEMAN, *Sec'y.* [SEAL.]
CHA'S H. BOOTH. [SEAL.]

Signed, sealed, and acknowledged and security sworn to as to sufficiency, and approved by me in my office this 7th day of December, 1875.

THOMAS M. DARRAH, *Clerk.*

A copy. Teste: THOMAS M. DARRAH, *Clerk.*

Filed Dec. 8, 1875.

Teste: O. S. LONG, *Clerk.*

Notice of hearing.

In the supreme court of appeals of West Virginia.

THE WHEELING, PARKERSBURG AND CINCINNATI Transportation Company
vs.
THE CITY OF WHEELING.

APRIL 20TH, 1876.

33 The appellee will take notice that the appellant will insist upon a hearing of the case of The Wheeling, Parkersburg and Cincinnati Transportation Company vs. The City of Wheeling at the June term, A. D. 1876, of said court.

HENRY RUSSELL,
For Appellant.

To The City of Wheeling, appellee.

(Endorsed:) Notice accepted. G. W. Jeffers, att'y for def't. Filed Apr. 21, 1876. Teste: O. S. Long, cl'k.

34 In the supreme court of appeals.

And at another day, to wit, at a supreme court of appeals held in the city of Wheeling, on the 12th day of June, 1876.

THE WHEELING, PARKERSBURG AND CINCINNATI Transportation Company, plaintiff below, and plaintiff in error,
vs.
THE CITY OF WHEELING, DEFENDANT BELOW, and defendant in error.

Upon a supersedeas to a judgment of the municipal court of Wheeling rendered on the 17th day of November, 1875.

This day came the plaintiff in error, by Henry M. Russell, esq., its attorney, and the defendant in error, by George W. Jeffers and George B. Caldwell, esq's, its attorneys, and this cause was fully heard upon the transcript of the record of the judgment aforesaid, and the arguments of counsel thereon, but the court not being advised of its judg-
35 ment to be given, time is taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals held in the city of Wheeling on the same day and year first herein mentioned, to wit, on the 17th day of July, 1876.

THE WHEELING, PARKERSBURG AND CINCINNATI Transportation Company, plaintiff below, and plaintiff in error,
vs.
THE CITY OF WHEELING, DEFENDANT BELOW, and defendant in error.

Upon a supersedeas to a judgment of the municipal court of Wheeling, rendered on the 17th day of November, 1875.

The court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered by
36 the court that the judgment rendered in this case by the municipal court of Wheeling, on the 17th day of November, 1875, be affirmed, and that the defendant in error recover against the plaintiff in error thirty dollars damages and its costs about its defense in this court in this behalf expended; which is ordered to be certified to the municipal court of Wheeling.

The decision of points in the foregoing case, as appears in said written opinion, was concurred in by Judges Haymond, Moore, and Green, and the court prepared a syllabus of the points adjudicated in which the said judges concurred, and these facts and ordered to be recorded.

The syllabus and reasons stated in writing for the opinion of the court, as mentioned in the foregoing order, are in the words and figures following, to wit:

37 *Syllabus.*

THE WHEELING, PARKERSBURG AND CINCINNATI Transportation Company, plaintiff below and plaintiff in error,

vs.

THE CITY OF WHEELING, DEFENDANT BELOW AND defendant in error.

1. The city of Wheeling being authorized by law to assess, levy, and collect an annual tax for the use of the city, on personal property in the city, not to exceed fifty cents on every hundred dollars of the assessed valuation thereof, the assessment and collection of an annual tax upon the value of steamboats of 20 tons burden or more, belonging to the Wheeling, Parkersburg and Cincinnati Transportation Company, incorporated and organized by and under laws of the State of West Virginia, and whose chief office is in said city, and all of whose officers reside therein, and said city being
38 the home port of said steamboats, is not in violation of or prohibited by the 3rd paragraph of the 8th section of the first article of the Constitution of the United States, nor of the 3rd paragraph of the 10th section of the 1st article of the Constitution of the United States, nor of any other provision of said Constitution.
2. The taxes assessed and collected by said city upon said steamboats of said company according to the value thereof as personal property, were, under the facts agreed in this case, as stated in the opinion of this court filed in this cause, lawfully assessed and collected by the city from said company.

39 *Opinion.*

HAYMOND, P.:

The plaintiff brought an action of trespass on the case in assumpsit in the municipal court of Wheeling against the defendant, on the 13th day of July, 1875. Afterwards, at August rules, 1875, plaintiff filed its declaration containing two special counts and the common counts in assumpsit. The first and second counts are special. With the declaration the plaintiff filed a bill of particulars of its claim against the defendant. The account is dated "July 12th. Taxes illegally collected for 1870, $120.00; do. 1871, $125.00; do. 1872, $125.00; do. 1873, $90.00; do. 1874, $60.00, aggregating $520.00." At the November term, 1875, of said court, the defendant appeared to the action and filed a demurrer to the declaration and to each count thereof. The demurrer to the first and second counts was sustained by the court and overruled as to the other counts. The defendant then plead the general issue of non
40 assumpsit, on which issue was joined. A jury was waived by consent and the court heard and decided the cause, in lieu of a jury, upon an agreed statement of facts filed in the case, which contained all the evidence offered. The court rendered judgment at the same term in favor of the defendant, on the facts agreed, and against the plaintiff for the costs of suit. To the action of the court in rendering judgment for the defendant as aforesaid, the plaintiff excepted and tendered its bill of exceptions, which was signed, sealed, and made a part of the record. The cause has been brought to this court by supersedeas.

For the sake of brevity it is proper to consider the judgment of the court upon the demurrer to the special counts in connection with the judgment of the court upon the facts agreed, as the facts alleged in each of the special counts are substantially for the purposes of this suit the same as the facts agreed. If the facts agreed are insufficient to
41 sustain the plaintiff's action, then the said first and second counts are insufficient in law. It is proper, however, to remark that the plaintiff in this case has had, under the common counts, all the benefit he could have derived from each and both special counts if the demurrer had not been filed to these counts, as the parties agreed the facts in the cause and submitted them to the court for its judgment thereon. It appears by the bill of exceptions in the cause that the facts agreed and upon which the court grounded its judgment are substantially as follows, viz:

That the city of Wheeling is, and was before the year 1868, a corporation chartered as a city under the laws of Virginia and West Virginia. That the Wheeling, Parkersburg and Cincinnati Company is a corporation chartered and organized in the year 1868, under the laws of the State of West Virginia, for the purpose of carrying on a transportation business with steamboats and barges upon the Western rivers.
42 That a portion of its stockholders reside in West Virginia and part in Ohio; that the officers of the company reside in Wheeling, and that plaintiff's principal office is there.

That during the years 1870, 1871, 1872, 1873, and 1874 the plaintiff owned eight steamboats, having a different number of them at different times during the said years, and owning usually two, three, or four at the same time.

That at time of the institution of this suit the plaintiff owned four of said steamboats; that each of said steamboats is of greater burden than twenty tons; that during the five years the plaintiff owned no other property whatever except the said steamboats and their appropriate outfits, and during all of the said years the plaintiff employed all of said vessels during such periods as it owned them, respectively, in making daily voyages between the city of Wheeling and the city of Parkersburg, in Wood County, West Virginia, a distance of
43 about 100 miles down the Ohio River; that each of said vessels began its voyage at Wheeling every alternate day about 10.30 a. m.; touched, in order to discharge and receive passengers and freight, at various towns along the river, some of which are in the State of Ohio, and some in the State of West Virginia; arrived at Parkersburg about midnight; remained there at the wharf until about daylight, when it left on its return voyage; stopped at the same places and for the same purposes on its way up the river, and reached Wheeling between midnight and morning, according to the stage of the water in the river; remaining at the Wheeling wharf from that time until its hour of departure.

That these voyages were made for the purpose of transporting for hire passengers and freight between the said various ports, and much of the plaintiff's business consisted in transporting passengers
44 and freight from one port in Ohio to another in the same State; some in transporting them from one port in West Virginia to another in Ohio; and some in transporting them from one port in West Virginia to another in the same State. That these vessels were used in no other manner than as herein set forth; that there were always at least three of said boats, either at the wharves of said city or lying along some portion of the bank of said river within the corporate limits of said city;

that each of said vessels, during such time as it was owned by the plaintiff, was duly enrolled and licensed as a coasting vessel under the laws of the United States, and the plaintiff paid for it all dues, fees, and charges which were demandable under the laws of the United States; that the plaintiff has paid the defendant various sums of money for the use of its wharves by the said vessels, and all that was demanded on that account, and no part of the taxes hereinafter mentioned were demanded as wharfage dues.

45 That portion of the laws of the State of West Virginia under which the taxes hereinafter mentioned were assessed, levied, and collected is as follows:

"The council of the city of Wheeling shall have authority, under such regulations as they may prescribe by ordinance, to assess, levy, and collect an annual tax for the use of the city, on personal property in the city, not to exceed in any year fifty cents on every hundred dollars of the assessed valuation thereof; and the words personal property shall be deemed to include all subjects of taxation which the assessors, acting under the laws of the State, are or shall be by law required to enter on their personal-property books for the purpose of State taxation."

That another portion of the said laws gives the right to the person appointed to collect such tax, in case it shall not be paid, to take reasonable distress of any personal property in the city belonging to the delinquent, to sell the same and pay the tax out of the proceeds.

46 That George Q. Black, the collector hereinafter named, was, during the years 1874 and 1875, the person duly appointed by the city to collect its taxes, as was Jacob M. Worden (the taxes collectable by whom, the said George Q. Black, was, at the time he collected them, duly authorized to collect) during the years 1870, 1871, 1872, and 1873; that during the years 1870, 1871, 1872, 1873, and 1874 the plaintiff was, by the regular officers of said city, assessed with personal property in various amounts; that there is no objection to the amount of these assessments; that the tax bills, hereinafter set out, are copies of the assessor's books, so far as they relate to the plaintiff, except those parts of the tax bills which are receipts. That on the 10th day of July, 1875, the said George Q. Black, as collector as aforesaid, demanded of the plaintiff taxes for said years 1870, 1871, 1872, 1873, and 1874 in the amounts and according to the assessments contained in said tax

47 bills, and threatened to levy on one of plaintiff's boats unless the said taxes were paid, and the plaintiff then, under protest, and in order to escape said levy, and explaining to the said collector that it believed the taxes illegal, paid them with the intention of suing for their recovery, and paid the said taxes to said Black for said city; that the dates and amounts are correctly set forth in the said tax bills; and the tax bills were then signed and delivered as receipts to the plaintiff by the said Black.

The tax bill for each of said years against the plaintiff is set out at large, and at the bottom of each is a receipt of payment thereof as of 10th day of July, 1875, and signed "George Q. Black, D. C., for Jacob M. Warden, city col."

The only charge against plaintiff in the tax bill of 1870 is as follows, viz: "On total valuation, $24,000, at 50 cents on every $100 val. p. p., $120.00"; and in the tax bill of 1871, "On total valuation

48 $25,000, at 50 cents on every $100 valuation, p. p., $125. School levy, city dist., 30 cents, and for building fund, 7 cents on every $100 valuation, r. and p. p. $92.50—total, $217.50"; and in tax bill for 1872, "On total valuation $25,000, at 50 cents on every $100

valuation p. p., $125.00; school levy, city district, 25 cents on every $100 valuation r and p. p., $112.50—total, $237.50"; and in tax bill for 1873, "On total valuation $30,000, at 30 cents on every $100 val. p. p., $90.00; school levy, city dist., 20 cents, and for building fund 15 cents on every $100 val. r. and p. p., $105.00—total, $195.00"; and in tax bill for 1874, "Total valuation personal property $20,000, at 30 cents for every $100 valuation, $60.00; school levy, city dist., 25 cents, and for building fund, 15 cents on every $100 val. r. est. and p. prop., $80.00—total, $140.00."

After setting out the said tax bills in extenso, the agreement of facts proceeds to state further, substantially, that the abbreviations "p. p." in the said tax bills means "personal property"; that the amounts
49 collected and named as "school levy" were not for the city; that the taxes so paid to said Black for the said city were for the general expenses and purposes of the city, and not for any special fund; that plaintiff before bringing this suit, demanded from the said city, the defendant, the taxes so paid; that in making the said assessment upon the plaintiff its property was assessed according to rule, and not according to any other rule of calculation, estimating its value in proportion to the assessments upon personal property generally in the said city.

It further appears by the bill of exceptions that after the court found for the defendant upon the facts agreed the plaintiff moved the court to set aside its said finding and find for the plaintiff; and the court overruled the motion. It is now here claimed by the plaintiff that the court erred in its rulings and judgment, in this: First, that the assessment of said taxes on said steamboats for each of said years, and the collection thereof, was in violation of art. 1, section 10, para-
50 graph 3, of the Constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any duty of tonnage"; second, that the assessment of said taxes for each of said years and the collection thereof was in violation of art. 1, sect. 8, paragraph 3 of said Constitution, which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

The first and chief question to be determined in this cause is, whether the assessment of the taxes upon the value of said steamboats against the plaintiff, and the collection of the taxes from the plaintiff, is prohibited by the said two paragraphs of the Constitution of the United States above quoted. It is conceded in argument that the council of the city may levy and collect taxes annually, for the use of the city, on personal property in the city, subject to certain limitations as to the amount of such tax not necessary to specify here. That the per-
51 sonal property which may be taxed includes all subjects of taxation which the assessors, acting under the laws of the State, are or shall be by law required to enter on their personal-property books for the purpose of taxation. This seems to be the law, whether so admitted by the counsel or not. The steamboats in question are certainly personal property and subject to taxation according to their value, as other property, by the State for State purposes, and by the city for its use, unless they are exempt from such taxation by some constitutional provision or statutory law. The property upon which such taxes were levied and collected was the steamboats aforesaid, and no other property. Whether the steamboats aforesaid, under the facts and circumstances stated in the facts as agreed before circuit court, are subject to taxation by the State or city as property in the manner the taxes in-

volved in this case were assessed, though never determined by the supreme court of this State, is not new to the Supreme Court of the
52 United States, and the highest judicial tribunals of some of the other States of the Union. The question has been maturely considered and pronounced upon by some of the best judicial minds of the nation. In what are known as the Passenger Cases, commencing on page 287 of the 7th vol. of Howard R., Judge McLean says, at page 402:

"A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet in both instances the tax on the property in some degree affects its use."

Were the steamboats a part of the personal property within the State and a part of the personal property in the city as belonging to
53 plaintiff? In the case of Hays vs. The Pacific Mail Steamship Co. (17 Howard, 597), Nelson, judge, at page 599, says:

"Whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than the others. She is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State or changing her home port. Our merchant vessels are not unfrequently absent for years in the foreign carrying trade, and unlading it from port to port during all the time absent, but they neither lose their national character or their home port."

Wheeling was the home port of the steamboats of plaintiff.
54 Plaintiff was, when the taxes were levied and collected, a corporation, incorporated and organized under the laws of West Virginia; and plaintiff's chief office was at Wheeling, and its officers resided there. In the cases of Cox vs. The Collector, and Trade Company vs. Same (12th Wallace, R. 204), according to the syllabus it was decided by the Supreme Court of the United States: 1. Although taxes levied, as on property, by a State upon vessels owned by its citizens, and based on a valuation of the same, are not prohibited by the Federal Constitution, yet taxes cannot be imposed on them by the State "at so much per ton of the registered tonnage." Such taxes are within the prohibition of the Constitution, that "no State shall, without the consent of Congress, lay any duty on tonnage."

In the cases last cited, Justice Clifford, who delivered the opinion of the court, which seems to have been unanimous, says, commencing at page 212:

"Power to tax, with certain exceptions, resides with the States,
55 independent of the Federal Government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as, without the consent of Congress, they are unconditionally prohibited from exercising any such power. Outside of these prohibitions the power of the State to tax extends to all objects within the sovereign power of the States, except the

means and instruments of the Federal Government. But ships and vessels owned by individuals, and belonging to the commercial marine, are regarded as the private property of their owners, and not as the instruments or means of the Federal Government, and as such, when viewed as property, they are plainly within the taxing power of
56 the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution. Argument, therefore, to show that they may be taxed as other property belonging to citizens of the State is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudications to support that proposition are not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a State, would be legal, and no doubt is entertained that the concession is properly made." Nathan v. Louisiana (8 Howard, 82); Howell v. Maryland (3 Gill, 14).

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same, are not within the prohibition of the Constitution, but it is equally clear
57 and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation, are within that clause of the instrument which prohibits the States from levying any duty of tonnage without the consent of Congress. Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question. (12 Wallace, 213 & 214.)

In the case of Morgan vs. Parham (16 Wallace, 471), which was decided December, 1872, according to the syllabus it was decided:

"1. When a vessel is regularly registered in the port to which it belongs, that is to say, 'in the port nearest to which her owner, husband, or acting and managing owner usually resides' [registered ex. gr. at New York], the fact that she may be temporarily in a port of a State [as ex. gr., Mobile, in Alabama], other than that where her home-port is, and engaged in lawful commerce—one of the daily line of steamers—
58 between that port and the port of a yet third State [as ex. gr., New Orleans, in Louisiana], does not cause her to become incorporated into the personal property of the State of Alabama, and no State but that in which her home-port is has dominion over her for the purpose of taxation. 2. The fact that the vessel was enrolled by her master as a coaster at Mobile, Alabama, and that her license as a coaster was renewed from year to year, does not affect her registry in New York or her ownership there. It accordingly does not change the rule."

In the case last cited, Justice Hunt, who delivered the opinion of the court, says, commencing at page 474:

"The fact that the vessel was physically within the limits of the city of Mobile at the time the tax was levied does not decide the question. Thus, if a traveller on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a
59 wagon, it is not contended that the property of either of those persons would be subject to taxation within the city. It is conceded by the respective counsel that it would not have been. On the other hand, this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a post-coach engaged in local business within a State may be subject to local taxation, although it carry the mail of the United States. The commerce between the States may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. Gibbens v. Ogden (9th Wheaton, 1);

Passenger Cases (7 Howard, 283). It is not therefore upon this principle that we are to decide the case. Nor does it fall within that range of cases of which Th eSteamship Company v. The Port Wardens (6 Wallace, 31), and Gibbens vs. Ogden, furnish illustrations. In each of these cases the taxation was upon a subject directly connected with the navi-
60 gation of the public waters and with the commerce of the country. In the first case a statute had been passed requiring every vessel entering the harbor of New Orleans to pay five dollars to the port-wardens, in addition to other fees, whether any service' were performed or not. In the second case, vessels navigating the waters of the Hudson River were required to take a license for that purpose from the State of New York. The imposition in this class of cases was a tax upon the use of the public waters of the country, and tended immediately to interfere with and to obstruct the commerce between the States.

"In the instance before us the tax was upon a vessel at the wharf It was in this respect as if a tax had been levied upon lumber or cotton lying on the dock at Mobile. This vessel was owned by and employed the service of a resident of the State of New York. It was primarily and presumptively taxable under the authority of that State and that State only. It is urged that her status or condition was affected
61 by what was done, or negiected, in regard to her register and enrolment. In Blanchard vs. Martha Washington the law on this subject is thus explained: 'Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be deemed to be at or nearest to which the owner, if there be one, or, if more than one, the husband and acting manager, resides. * * * There was nothing, therefore, in her enrolment in the port of Mobile that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama under the circumstances stated. It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there
62 temporarily, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value. The case of Hays vs. The Pacific Mail Steamship Company (17 Howard, 596) is decisive of the case before us."

In addition to the decisions of the Supreme Court of the United States which I have cited, there have been decisions by some of the State courts of great weight as authority upon the question involved here. See Perry vs. Torrence (8 Ohio, 521); 3 Gills R., 14; 9 Alabama, 234; Lott, tax-collector, vs. Mobile Trade Co. (43 Alabama, 578). See also in opinion of Judge Joynes, 20 Gratt, 424, 425.

In the case in 8 Ohio, 521, it was decided that "a State law including steamboats as a portion of the property subject to taxation is not unconstitutional." In this case the court in its opinion, at the conclusion, says: "The conclusion on the whole is that the tax complained
63 of does not interfere with the power of Congress to regulate commerce; nor can it be regarded as a tonnage duty, because that is a tax which is levied upon the vessel as an instrument of navigation, and without reference to the place where she is owned."

It will be seen on examination of the case of Perry vs. Torrence that the principle determined in that case fully determines that the levying

and collecting the taxes involved in this case was and is not prohibited by the Constitution of the United States. In the case under consideration the plaintiff is a West Virginia corporation—all its officers reside at the city of Wheeling, and its (plaintiff's) chief office was also at said city during all the time for which said taxes were levied and collected. The city was also the home port of the steamboats taxed, and the steamboats became incorporated into the property of the city, and were justly and properly liable to be taxed according to their value as any
64 other property in the city. The taxes assessed and collected upon said steamboats according to their value as property, as was done in this case, were legally and properly assessed and collected by the city under the laws of this State, and the assessing and collecting the same is not prohibited by the Constitution of the United States. Upon the whole, it seems to me that the finding and judgment of the municipal court of Wheeling upon the facts agreed in this case were right and proper and not erroneous.

For the foregoing reasons the judgment of the said municipal court of Wheeling rendered in this cause on the 17th day of November, 1875, is affirmed by this court with costs and thirty dollars damages to the defendant in error against the plaintiff in error.

65 STATE OF WEST VIRGINIA, *ss:*

I, O. S. Long, clerk of the supreme court of appeals of West Virginia, do hereby certify that the foregoing is a true transcript of the record of the case of the Wheeling, Parkersburg and Cincinnati Transportation Company against the City of Wheeling, with all things touching the same, as fully and wholly as they exist among the records and proceedings of the court aforesaid.

In testimony whereof I hereto subscribe my name and affix the seal of the said supreme court of appeals at Wheeling this 18th day of August, 1876, and in the 14th year of the State.

[SEAL.] O. S. LONG.

Fee for this record, $1.00.

66 To the honorable A. F. Haymond, president of the supreme court of appeals of West Virginia:

Your petitioner, the Wheeling, Parkersburg and Cincinnati Transportation Company, humbly represents unto your honor that on the 17th day of July, A. D. 1876, a judgment was rendered by the said court, at its term in the city of Wheeling, against your petitioner in a suit in which your petitioner was plaintiff and appellant, and the City of Wheeling was defendant and appellee. And your petitioner further represents that in the said suit there was drawn in question the validity of a statute of and an authority exercised under the said State, on the ground that they were repugnant to the Constitution and laws of the United States, and that the decision of the said court in the said suit was in favor of the validity of such statute and authority; and that there was also drawn in question the construction of certain clauses of the
67 Constitution of the said United States, and that the said decision was against the right, privilege, and exemption specially set up and claimed under such clauses of the said Constitution; and that, if there was error in the said judgment of the said supreme court of appeals, that being the highest court in the said State having jurisdiction of the said suit, your petitioner is entitled to have the same reviewed and corrected by the Supreme Court of the United States.

Your petitioner is advised and respectfully represents to your honor

that there is error in the said judgment of the said supreme court of appeals, in that the said decisions respecting the said statute and authority and the said clauses of the said Constitution were rendered against instead of in favor of your petitioner.

Wherefore your petitioner prays your honor to allow it a writ of error to the said supreme court of appeals of West Virginia, so that the said suit, and the said judgment and decision therein, may be caused
68 to come before the said Supreme Court of the United States, where the whole matter in said suit may be reviewed; and your petitioner will ever pray, &c.

THE WHEELING, PARKERSBURG AND
CINCINNATI TRANSPORTATION COMPANY,
By HENRY RUSSEL, *Attorney.*

UNITED STATES OF AMERICA,
State of West Virginia, to wit:

I, A. F. Haymond, president of the supreme court of appeals of the State of West Virginia, do hereby allow the petitioner in the foregoing petition a writ of error to the judgment of the supreme court of appeals of the State of West Virginia, rendered on the 17th day of July, A. D. 1876, prayed in the said petition and as therein prayed, to the end that said judgment may be reviewed by the Supreme Court of the United States, to take effect upon the petitioner, or some other person or persons, executing bond with good and sufficient personal security in the penalty of one thousand dollars, conditioned according to law, and
69 as prescribed in such cases, said bond to be executed and filed as prescribed in such case within ten days from this date. And I hereby certify that said judgment was final, and that said supreme court of appeals of West Virginia was and is the highest court in said State having jurisdiction of said suit; and I further certify that there was drawn in question in said suit the construction of certain clauses of the Constitution of the United States, and that the decision in said suit was against the exemption specially set up and claimed under such clauses of the said Constitution. Given under my hand as president of the supreme court of appeals of the State of West Virginia this 21st day of September, A. D. 1876.

A. F. HAYMOND,
President of the Supreme Court of Appeals of the State of West Virginia.

70 (Indorsed:) Sup. C't U. S. 1876, Octo. term. No. 768. Wheeling, Parkersburg & Cinn. Transpr. Co., pl'ff in error, vs. The City of Wheeling. Petition for writ of error. Filed 18 October, 1876.

W., P. & C. Trans. Co. vs. City of Wheeling. Copy of petition for and allowance of writ of error. Attest: O. S. Long, cl'k.

Original filed in the clerk's office of the supreme court of appeals of the State of West Virginia, Sept. 23, 1876. Attest: O. S. Long, clerk.

(Indorsement on cover:) No. 203. The Wheeling, Parkersburg and Cincinnati Transportation Company, plaintiff in error, vs. The City of Wheeling. Filed 9th October, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 203.

THE WHEELING, PARKERSBURG, AND CINCINNATI TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF WHEELING.

In Error to the Supreme Court of the State of West Virginia.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

MONTGOMERY BLAIR,
Of Counsel for plaintiff in error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 203.

THE WHEELING, PARKERSBURG, AND CINCINNATI TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF WHEELING.

In Error to the Supreme Court of the State of West Virginia.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action for the recovery of taxes paid under protest to defendant by plaintiff in error, as owners of certain steam vessels used by them in the navigation of the Ohio river, between the city of Wheeling and Parkersburg and intermediate places on both sides of the river, in the States of West Virginia and Ohio. The vessels were of greater burden than twenty tons, and were duly enrolled and licensed under the laws of the United States. The plaintiffs were incorporated under the laws of West Virginia. The stock of the company was partly owned in West Virginia and partly in Ohio. The principal office of

the company was at Wheeling, and the vessels started from that place on their daily voyages to Parkersburg, and laid up in Wheeling when not in use, (p. 11.)

The vessels were assessed according to their value as personal property of the plaintiff in error, and the taxes were collected under the laws of West Virginia, authorizing the city of Wheeling to "assess, levy, and collect an annual tax for the use of the city on personal property in the city." The right of the State to impose taxes on such vessels was denied by the plaintiff in error as in violation of Article I, section 10, paragraph 3 of the Constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any duty of tonnage," and of Article I, section 8, paragraph 3, which provides that Congress shall have power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." The supreme court of appeals of the State of West Virginia held the taxes in question not to be within these provisions of the Constitution, and gave judgment against the plaintiff in error, (p. 19.)

ASSIGNMENT OF ERROR.

And this decision is assigned for error.

ARGUMENT.

1. The question in the case is whether national vessels, or vessels duly enrolled and licensed under the laws of the United States to carry on inter-State commerce, are subject to State taxation. It is conceded that if the tax had been measured by the number of tons in the vessels it would have been illegal; but it is contended that the prohibition of the Constitution is avoided by taxing them according to their value instead of according to their capacity. The plaintiff in error denies this, and maintains that the construction of the Constitution contended for by defendant

and adopted by the State court is contrary to the principles of construction established by the rulings of this Court in respect to the provisions of the Constitution in question.

In Corley *vs.* Philadelphia, (12 Howard, 313,) the Court held, in effect, that any tax which operates a charge on on such vessels, even though indirectly imposed, would be a tonnage duty, and says that a tonnage duty might be levied under the name of pilot dues or penalties, and "that it is the *thing*, and not the name, which is to be considered." And to the same effect is the case of the Steamship Company *vs.* The Portwardens, (6 Wall., 31.) In that case a tax of $5 was imposed upon each vessel by the State of Louisiana; but the Court held that this tax, which had no reference to the amount of the tonnage of the vessels, was both a tonnage duty and a regulation of commerce; and for both reasons void. The Court says:

"We think, also, that this tax imposed by Louisiana is, in the fair sense of the word, a duty of tonnage. In the most obvious sense these words describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. *The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on ships, which serve as vehicles of commerce.* This extension was doubtless intended by the prohibition of any duty on tonnage. It was not only a *pro rata* tax which was prohibited, *but any duty on the ship.*"

Is not this a duty on the ship?

It is contended by the defendants that it is not, because not so *eo nomine;* and that the Constitution excepts shipping from taxation only when the law attempts to tax it by its description as shipping.

The points decided bearing on the question here before the Court are, *first*, that the residence of the owners is immaterial, (12 Wall., 204, *infra;*) *second*, that it is not neces-

sary that the duty should be according to the capacity of the vessel; any tax upon a ship, however inconsiderable, is a tonnage duty, and is prohibited, (6 Wall., 31, *supra;*) and, *third*, it is not the *name* but the *thing* that is prohibited, (12 How., 299.) Now, the vessels in question are just as much within the description of things taxed by the West Virginia statute as if the statute had specifically taxed vessels by name, for it is *as ships* that they are assessed, and not as so much timber and iron. Hence it is the *thing* which is prohibited and not the *name*. The prohibition certainly applies here.

In support of the decision of the State court there is cited the language of Mr. Justice McLean in the Passenger Cases, (7 Howard, p. 287,) and of Mr. Justice Clifford in the case of Cox and the Trade Company *vs.* The Collector, (12 Wall., p. 204.) Also certain expressions in Hays *vs.* The P. M. Company, 17 Howard, 596; State Tonnage Tax Cases, 12 Wall., pp. 212, 213; and in Morgan *vs.* Parkham, 16 Wall., 473.

It is undeniable that the language cited tends to sustain the views of the State court; but the questions before this Court in those cases did not involve the question now here presented for the first time, and, as we contend, is in conflict with the principles actually decided by the Court.

The right accorded to the States by Chief Justice Marihall, in McCulloch *vs.* Maryland, (4 Wheat., 316,) to tax the interest of their citizens in the bank of the United States, whilst exempting the bank from such taxation, seems to be the origin of the *dicta* upon which the defence relies n this case. But there is no analogy between the cases. Shipping has not the double character of the bank as a public agency and a private property, and does not owe its exemption from taxation to any implication arising from its being a public agency, which exempts it from taxation only in that character, leaving it subject to taxation in its character as private property, according to

its value. It is exempt by the express terms of the Constitution, whilst recognized as private property, in all respects, of the citizens of the States. This exemption extends to any form or amount of taxation upon any ship enrolled and licensed under the laws of the United States, and the reason given by the Court in The Steamship Company *vs.* The Portwardens for the exemption is that "the prohibition upon the States levying duties upon imports and exports would have been insufficient if it had not been extended to ships which serve as vehicles of commerce." The same thing is said in Gibbons *vs.* Ogden, (9 Wheat., 1,) where the language of the Court is, "a duty of tonnage is as much a tax as a duty on imports or exports, and the reason which ensured the prohibition of these taxes extends to this also." Hence all the reasoning which the Court has applied to prevent any State taxation upon imports by "varying the form without varying the substance," is equally applicable to prevent the States from imposing any tax upon shipping.

Now, the argument for the right of States to tax imports in Brown *vs.* Maryland, (9 Wheat., 419,) was substantially the same now offered in support of the right of the State to tax ships, viz: that the tax was a personal tax, and that it was only the *kind* of tax known as "an import tax" which was prohibited; but the Court held the tax in that case to be illegal, because it operated as a tax on imports, upon which no kind or form of taxation by the State was admissible. It would not be denied that the tax here in question, f levied upon imports, by the description of "personal property," would come within the rule in Brown's case, and be prohibited, for the Court, in that case, held, expressly, that no tax whatever can be imposed by the States upon the property of their citizens, so far as it consists of imports. There was a difficulty in defining in advance when imported merchandise ceased to be "imports" within the

meaning of the Constitution, and that question must be settled as the cases arise. But there was no difficulty in declaring that whatever should be held to be an import was not, whilst in that condition, subject to any form of State taxation. Now, as shipping is put by the Constitution upon the same footing precisely as imports, it would seem to follow, necessarily, that any tax which operated as a tax upon property whilst it continued in the form of shipping would be as illegal as a tax upon property whilst it remained in the condition of imports.

In this case, as in those of the Portwardens, (6 Wall., 31,) Gibbons *vs.* Ogden, (9 Wheat., 1,) the taxation is upon a subject directly connected with navigation, and the only distinction attempted to be made between the cases is, that the vessels in this case were assessed at the home port as part of the personal property of the State. But this was equally true in the cases of Cox *vs.* The Collector, and The Trade Company *vs.* Collector, (12 Wall., p. 202,) in which a tonnage tax assessed at the home port was held to be within the prohibition of the Constitution. As its being at the home port does not give the right to impose a tonnage tax, and the prohibition is not limited to a tonnage tax strictly so called, but extends to any duty, whether imposed directly or indirectly, upon a ship, or in any manner, the principle involved here would seem to have been decided for the plaintiff in error.

Nor does it affect the question that vessels are not enumerated in the tax law as subjects of taxation If exempt at all, they would be equally exempt from a tax imposed upon them by their description as personal property as by their description as ships—it being held by this Court that the prohibition of the Constitution is not limited to forbidding "a duty proportioned to the tonnage of the vessels," but as forbidding "any duty on the ship." The prohibition is, therefore, unrestricted. They are the tools of that for-

eign and inter-State trade which it was intended to withdraw absolutely from State taxation and control, and, like the tools of particular trades which are exempt from taxation by the States, are as exempt from a general tax on personal property as from a specific duty on the articles.

And they are equally within the reason of the exemption from a tax on personal property as when taxed specifically, because the effect in both cases is to tax foreign and inter-State commerce.

It is not a sufficient answer to say that as the tax is proportioned to the value of the property and shares only the common burden imposed upon other personal property within the State, the foreign and inter-State commerce cannot be injuriously affected by it. This does not follow and the present languishing condition of the shipping interest evinces the wisdom of exempting it from State taxation.

But the reply made by the Court in Brown *vs.* Maryland to the suggestion that the State might be trusted not to tax imposts or exports to its own prejudice is equally applicable to shipping, viz: that the Constitution had not left the question open.

And it is necessary to prohibit State taxation upon shipping in every form to secure the uniformity of duties, imports, and excises required by the 4th cl. 8th sect. 1st art. of the Constitution. For as "the prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on ships, which serve as vehicles of commerce," it necessarily follows that such duties cannot be uniform whilst the vehicles of commerce are taxed at different rates by the different States.

The fact that State taxation upon vessels at the home port as part of the personal property of citizens has been customary, will not influence the judgment of the court, be-

cause the custom was founded on the assumption that the prohibition of the Constitution was limited to tonnage duties "in the most obvious sense" of these words; but as this court has now declared this construction to be erroneous, and that it "was not only a pro rata tax which was prohibited, but any duty on the ship," and also that the tax need not be levied on the ship in terms, but will be illegal if it operates as a charge upon shipping, the custom is shown to have been illegal.

MONTGOMERY BLAIR,
Of Counsel for plaintiff in error.

MARCH, 1879.